



INVESTOR-STATE DISPUTE SETTLEMENT: REVIEW OF DEVELOPMENTS IN 2014

Highlights

- Investors continue to use the investor-State dispute settlement (ISDS) mechanism. In 2014, claimants initiated 42 known treaty-based ISDS cases. The total number of known ISDS cases reached 608.
- 40 per cent of new cases were initiated against developed countries (the historical average is 28 per cent). A quarter of all new disputes are intra-EU cases.
- The two types of State conduct most commonly challenged by investors in 2014 were cancellations or alleged violations of contracts and revocations or denials of licences. The sectors where most cases were filed in 2014 are the generation and supply of electric energy (at least eleven cases), followed by oil, gas and mining (ten), construction (five) and financial services (three).
- The Energy Charter Treaty (ECT) surpassed the North American Free Trade Agreement (NAFTA) as the most frequently invoked IIA.
- ISDS tribunals rendered at least 43 decisions in 2014, 34 of which are public. The overall number of concluded cases has reached 356, with 37 per cent decided in favour of the State, 25 per cent in favour of the investor and 28 per cent of cases settled.
- Arbitral decisions adopted in 2014 touch upon a number of important legal issues concerning the scope of treaty coverage, the conditions for bringing ISDS claims, the meaning of substantive treaty protections, the calculation of compensation and others. On a number of issues, tribunals continue to arrive at divergent conclusions.
- The IIA regime is going through a period of reflection, review and revision. Investment dispute settlement is at the heart of this debate, with a number of countries reassessing their positions. There is a strong case for a systematic reform of ISDS.
- UNCTAD's forthcoming *World Investment Report 2015* will present an action menu for investment regime reform.

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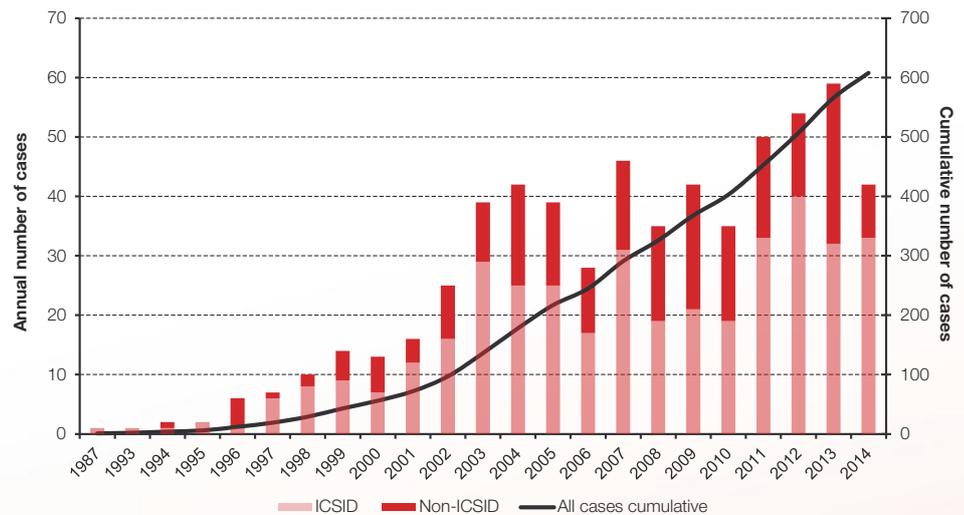


I. Statistical update (as of end 2014)¹

In 2014, investors initiated 42 known ISDS cases pursuant to international investment agreements (IIAs) (annex 1).² This is lower than the record high numbers of new claims in 2013 (59 cases) and 2012 (54 cases) and closer to the annual averages observed in the period between 2003 and 2010.³ As most IIAs allow for fully confidential arbitration, the actual number of cases is likely to be higher.

Last year's developments brought the overall number of known ISDS claims to 608 (figure 1). Ninety nine governments around the world have been respondents to one or more known ISDS claims (annex 2).

Figure 1. Known ISDS cases, annual and cumulative (1987–2014)



Source: UNCTAD, ISDS database

Respondent States. The relative share of cases against developed countries is on the rise. In 2014, 60 per cent of all cases were brought against developing and transition economies, and the remaining 40 per cent against developed countries. The share of cases against developed countries was 47 per cent in 2013, and 34 per cent in 2012, while the historical average is 28 per cent. In total, 32 countries faced new claims last year. The most frequent respondent in 2014 was Spain (five cases),⁴ followed by Costa Rica, the Czech Republic, India, Romania, Ukraine and the Bolivarian Republic of Venezuela (two cases each). Three countries – Italy, Mozambique and Sudan – faced their first (known) ISDS claims in history. The most frequent respondent States are presented in figure 2.

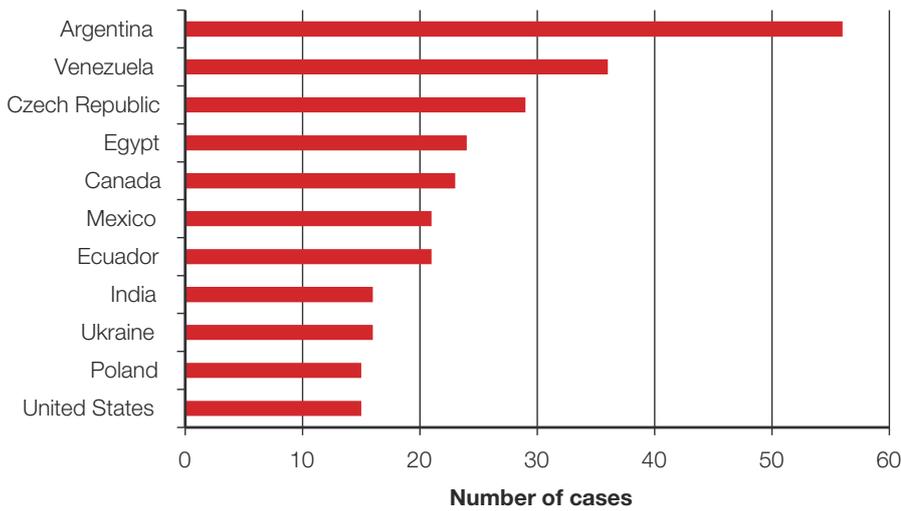
¹ Information about 2014 claims has been compiled on the basis of public sources, including specialized reporting services such as *Global Arbitration Review* and *Investment Arbitration Reporter*. We are grateful for additional information received from the ICSID Secretariat and the Energy Charter Treaty Secretariat.

² This Note does not cover cases that are exclusively based on investment contracts (State contracts) or national investment laws, nor cases where a party has so far only signalled its intention to submit a claim to ISDS, but has not yet commenced the arbitration.

³ Annual and cumulative case numbers are being continuously adjusted as a result of verification and may not exactly match the case numbers reported in the previous years.

⁴ All five new claims against Spain arise from the same measures that prompted the six claims against the country in 2013. Claimants maintain that the seven per cent tax on the revenues of power generators and a reduction of subsidies for renewable energy producers – introduced by Spain in 2012 to counter the budget deficit – wipe out expected profits from their investments in photovoltaic, solar thermal and wind plants.

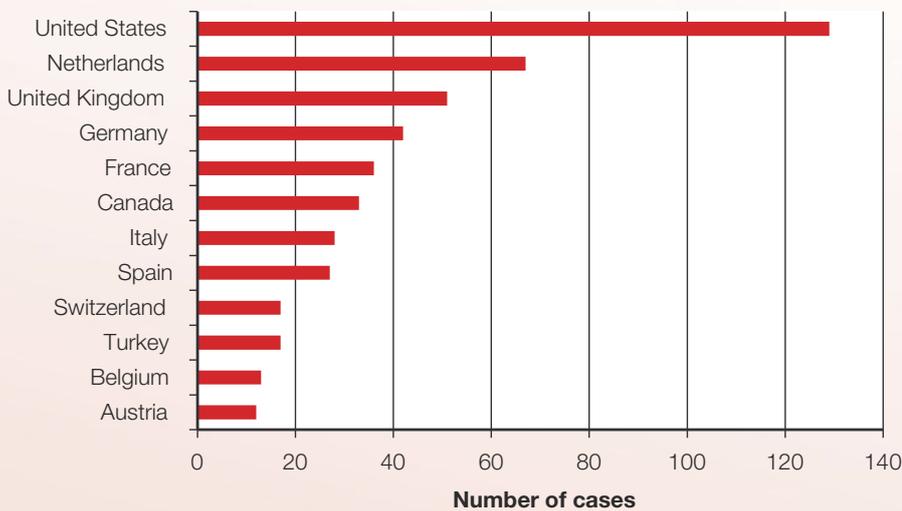
Figure 2. Most frequent respondent States (total as of end of 2014)



Source: UNCTAD, ISDS database

- Home country of investor.* Of the 42 known new cases, 35 were brought by investors from developed countries and five were brought by investors from developing countries. In two cases the nationality of the claimants is unknown. The most frequent home States in 2014 were the Netherlands (seven cases by Dutch investors), followed by the United Kingdom and the United States (five each), France (four), Canada (three) and Belgium, Cyprus and Spain (two each). This corresponds to the historical trend where developed-country investors – in particular, those from the United States, Canada and several European Union (EU) countries – have been the main users of the system responsible for over 80 per cent of all ISDS claims (figure 3).

Figure 3. Most frequent home States (total as of end 2014)



Source: UNCTAD, ISDS database

- Intra-EU disputes.* A quarter of all known new disputes (eleven) are intra-EU cases, which is lower than the year before (in 2013, 42 per cent of all new claims were intra-EU). Half of them were brought pursuant to the Energy Charter Treaty (ECT), and the rest on the basis of intra-EU BITs. The year’s developments brought the overall number of intra-EU investment arbitrations to 99, i.e. approximately 16 per cent of all cases globally.⁵

⁵ When calculating intra-EU disputes, the time factor (when a particular State joined the EU) has been disregarded; all disputes between States *currently* members of the EU are counted as intra-EU disputes.

- *Arbitral forums/rules.* Of the 42 new known disputes, 33 were filed with the International Centre for Settlement of Investment Disputes (ICSID) (of which three cases were under the ICSID Additional Facility Rules), six under the arbitration rules of UNCITRAL,⁶ two under the Stockholm Chamber of Commerce (SCC) and one under the International Chamber of Commerce (ICC) arbitration rules. These numbers are roughly in line with overall historical statistics.
- *Applicable investment treaties.* The majority of new cases (30) were brought under BITs. Ten cases were filed pursuant to the provisions of the ECT (twice in conjunction with a BIT), two cases under the Central America-Dominican Republic-United States Free Trade Agreement (CAFTA), one case under the NAFTA and one case under the Canada-Peru FTA. Looking at the full historical statistics, the ECT has now surpassed the NAFTA as the most frequently invoked IIA (60 and 53 cases respectively). Among BITs, the Argentina-United States BIT remains the most frequently used agreement (20 disputes).
- *Economic sectors involved.* About 61 per cent of cases filed in 2014 relate to the services sector. Primary industries account for 28 per cent of new cases while the remaining eleven per cent arose out of investments in manufacturing. Looking at the industries in which investments were made, the most numerous was generation and supply of electric energy (at least eleven cases), followed by oil, gas and mining (ten), construction (five) and financial services (three).
- *Measures challenged.* The two types of State conduct most frequently challenged by investors in 2014 were (i) cancellations or alleged violations of contracts or concessions (at least nine cases); and (ii) revocations or denial of licenses or permits (at least six cases). Other challenged measures include: legislative reforms in the renewable energy sector, alleged discrimination of foreign investors vis-à-vis domestic ones, alleged direct expropriations of investments, alleged failure on the part of the host State to enforce its own legislation, alleged failure to protect investments, as well as measures related to taxation, regulation of exports, bankruptcy proceedings and water tariff regulation. Information about a number of cases is lacking. Some of the new cases concern public policies, including environmental issues, anti-money laundering and taxation.
- *Amounts claimed.* Information regarding the amount sought by investors is scant. For cases where this information has been reported, the amount claimed ranges from USD 8 million⁷ to about USD 2.5 billion.⁸

II. ISDS outcomes in 2014

In 2014, ISDS tribunals rendered at least 43 decisions in investor-State disputes, 34 of which are in the public domain (at the time of writing) (annex 3).⁹ Of the 34 public decisions, eleven principally addressed jurisdictional issues, with six decisions upholding the tribunal's jurisdiction (at least in part) and five decisions rejecting jurisdiction.¹⁰ Fifteen decisions on the merits were rendered in 2014, with ten accepting – at least in part – the claims of the investors, and five dismissing all of the claims. The remaining

⁶ All of the UNCITRAL cases were filed pursuant to IIAs concluded prior to 2014 and, therefore, the new UNCITRAL Transparency Rules do not apply to any of them, unless the disputing parties agree to their application in their specific dispute.

⁷ *Anglia Auto Accessories, Ivan Peter Busta and Jan Peter Busta v. Czech Republic* (SCC).

⁸ *Cem Uzan v. Republic of Turkey* (SCC).

⁹ There may have been other decisions in 2014 whose existence is not known due to the confidentiality of the dispute concerned.

¹⁰ These exclude those decisions that upheld the tribunal's jurisdiction and considered at the same time the merits of the dispute.

eight public decisions were rendered on applications for annulment and on preliminary objections.

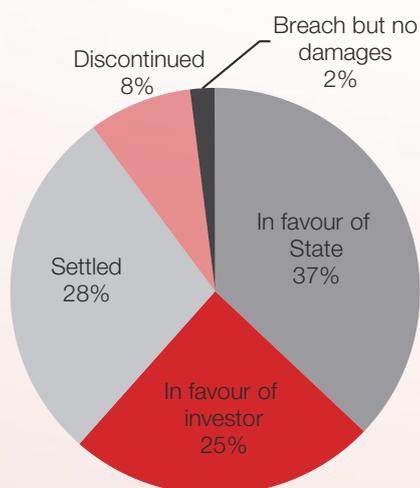
Of the ten decisions finding States liable, six found a violation of the FET provision and seven a violation of the expropriation provision. At least eight decisions rendered in 2014 awarded compensation to the investor, including a combined award of approximately USD 50 billion in three closely related cases, the highest known award by far in the history of investment arbitration.¹¹

Five decisions on application for annulment were issued in 2014 by ICSID *ad hoc* committees, all of them rejecting the application for annulment.¹²

Ten cases were reportedly settled in 2014, and another five proceedings discontinued for unknown reasons.

By the end of 2014, the overall number of concluded cases reached 356.¹³ Out of these, approximately 37 per cent (132 cases) were decided in favour of the State (all claims dismissed either on jurisdictional grounds or on the merits), and 25 per cent (87 cases) ended in favour of the investor (monetary compensation awarded). Approximately 28 per cent of cases (101) were settled¹⁴ and eight per cent of claims (29) were discontinued for reasons other than settlement (or for unknown reasons). In the remaining two per cent (seven cases) a treaty breach was found but no monetary compensation was awarded to the investor (figure 4).

Figure 4. Results of concluded cases (total as of end 2014)



Source: UNCTAD, ISDS database

¹¹ The aggregate amount of compensation obtained by the three claimants constituting the majority shareholders of former Yukos Oil Company in the ISDS proceedings against the Russian Federation. See *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 226, Award, 18 July 2014; *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 227, Award, 18 July 2014; *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 228, Award, 18 July 2014.

¹² Three out of the five applications for annulment had been filed by the respondent States, and the remaining two by the claimant investors.

¹³ As a result of the on-going verification of UNCTAD's ISDS database, a number of proceedings previously thought to be pending or those whose outcome was unknown have been confirmed as concluded.

¹⁴ In settled cases, the specific terms of settlement often remain confidential.

III. 2014 Decisions – An Overview¹⁵

A. Jurisdictional and admissibility issues

Definition of “investment” for purposes of establishing the scope of application of and jurisdiction under an investment treaty

The tribunal in *Nova Scotia Power v. Venezuela* stated that, in examining whether or not an investment is present, the definition of “investment” in the applicable BIT cannot be considered self-sufficient.¹⁶ In line with recent decisions, such as *Romak*,¹⁷ the *Nova Scotia* tribunal pointed to contribution, duration and risk as “*the triad representing the minimum requirement for an investment*”.¹⁸ The *Nova Scotia* tribunal concluded that the claimant’s activity was “*essentially [...] a sale and purchase of coal, even if it was more complicated in genesis and composition*”.¹⁹ Accordingly, the tribunal upheld the respondent’s jurisdictional objection that the dispute does not arise out of an “investment”.²⁰

In an *obiter dictum*, the tribunal in *Nova Scotia* agreed with an approach followed in other recent cases with regard to the question of when intangible assets constitute investment made “in the territory” of a host State.²¹ The tribunal explained that the test is “*whether the host State received a benefit*”.²² The *Nova Scotia* tribunal recognized that economic development might indicate a benefit to the host State; however, the tribunal went on to caution that the benefit “*does not necessarily have to be economic development, [as this is] a highly subjective element*” that can only be assessed in hindsight.²³ Instead, “*it is the alleged investment at the time of its inception that should be considered, not the impact that the investment has ultimately had.*”²⁴

The *ratione personae* jurisdiction under Article 25(2)(b) of the ICSID Convention

In *National Gas v. Egypt*, the tribunal noted that the parties to an IIA can agree to treat companies established in one State as nationals of another State if the latter own or control such companies, which is indeed what the

¹⁵ The Issues Note aims to highlight key findings stemming from all of the (publicly available) decisions that investment treaty tribunals rendered in 2014 (as well as decisions issued in previous years but made public during 2014). However, it is not a comprehensive review; attention is primarily given to capturing those aspects that represent novel developments or otherwise have systemic value. The texts of the relevant arbitral awards can be found at www.italaw.com.

¹⁶ *Nova Scotia Power Incorporated v. Bolivian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/1), Award (excerpts), 30 April 2014, para. 77.

¹⁷ *Romak S.A. (Switzerland) v. The Republic of Uzbekistan* (UNCITRAL, PCA Case No. AA280), Award, 26 November 2009, para. 207.

¹⁸ *Nova Scotia Power Incorporated v. Bolivian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/1), Award (excerpts), 30 April 2014, para. 84.

¹⁹ *Ibid.*, para. 113.

²⁰ *Ibid.*

²¹ See *Abaclat and Others v. Argentine Republic* (ICSID Case No. ARB/07/5) (formerly *Giovanna a Beccara and Others v. Argentine Republic*), Decision on Jurisdiction and Admissibility, 4 August 2011, para. 374 (“[T]he relevant question is where the invested funds [were] ultimately made available to the Host State and did they support the latter’s economic development.”); see also *Inmaris Perestroika Sailing Maritime Services GMBH and Others v. Ukraine* (ICSID Case No. ARB/08/8), Decision on Jurisdiction, 8 March 2010, para. 124 (“[A]n investment may be made in the territory of a host State without a direct transfer of funds there, particularly if the transaction accrues to the benefit of the State itself.”).

²² *Nova Scotia Power Incorporated v. Bolivian Republic of Venezuela* (ICSID Case No. ARB(AF)/11/1), Award (excerpts), 30 April 2014, para. 130, citing *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/09/02), Award, 31 October 2012, para. 295 (“[T]he existence of an investment must be assessed at its inception and not with hindsight.”).

²³ *Ibid.*, para. 130.

²⁴ *Ibid.*

parties to the Egypt-United Arab Emirates BIT had agreed.²⁵ In the case at hand, the tribunal concluded that although National Gas, a company registered in Egypt, was owned by UAE companies, the factual evidence showed unequivocally that it was ultimately controlled by Mr. Reda Ginena, an Egyptian national. The tribunal concluded, therefore, that the “foreign control” requirement in Article 25(2)(b) of the ICSID Convention was not met.²⁶

The “futility exception” to the local litigation requirement

Following the approach taken by the tribunal in *Ambiente Ufficio v. Argentina*,²⁷ the tribunal in *Giovanni Alemanni v. Argentina* confirmed the existence of a “futility exception” to the applicable treaty’s requirement to have recourse to local courts for a certain minimum length of time. While it noted that the legal effect of the host State’s offer to arbitrate “can only be produced if the investor accepts the offer on the terms specified by the host State” including the 18-month domestic court requirement,²⁸ the *Alemanni* tribunal found that that requirement “shows unambiguously [...] that the Contracting States had in view as the intervening step a process that would be potentially effective to settle the issue in dispute.”²⁹ The *Alemanni* tribunal determined that in the circumstances it was shown that Argentina’s judicial system was not “reasonably capable of providing effective relief” and therefore the claimants’ failure to comply with the BIT’s preconditions to arbitration “does not act as a jurisdictional bar to their commencing ICSID arbitration”.³⁰

Jurisdiction over claims brought by dual nationals

In *García Armas v. Venezuela*, the tribunal upheld jurisdiction over a dispute brought against Venezuela by two Spanish nationals who also held Venezuelan nationality.³¹ The tribunal based its reasoning on several grounds. First, it pointed out that some Venezuelan IIAs explicitly excluded dual nationals from protection whereas others – including the BIT applicable to the dispute – did not.³² Second, it noted that the exclusion of dual nationals in Article 25(2) of the ICSID Convention did not apply to the proceedings at hand as they were brought under the UNCITRAL arbitration rules.³³ Finally, it relied on Article 31 of the Vienna Convention

²⁵ Article 10(4) of the Egypt-United Arab Emirates BIT provides: “In case of the existence of a juridical person that has been registered or established in accordance with the law in force in a region [territory] following a Contracting State, and an investor from the other Contracting State owns the majority of the shares of that juridical person before the dispute arises, then such a juridical person shall, for the purposes of the Convention, be treated as an investor of the other Contracting State, in accordance with Article 25(2)(B) of the Convention.”

²⁶ *National Gas S.A.E. v. Arab Republic of Egypt* (ICSID Case No. ARB/11/17), Award, 3 April 2014, paras. 122-149. This decision is in line with the award in *TSA Spectrum de Argentina S.A. v. Argentine Republic* (ICSID Case No. ARB/05/5), 19 December 2008. For a contrasting approach, see *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16), Award, 29 July 2008; *The Rompetrol Group N.V. v. Romania* (ICSID Case No. ARB/06/3), Decision on Jurisdiction and Admissibility, 18 April 2008; and *Aguas del Tunari, S.A. v. Republic of Bolivia* (ICSID Case No. ARB/02/3), Decision on Jurisdiction, 21 October 2005.

²⁷ *Ambiente Ufficio S.p.A. and Others v. Argentine Republic* (ICSID Case No. ARB/08/09), Decision on Jurisdiction and Admissibility, 8 February 2013.

²⁸ *Giovanni Alemanni v. Argentine Republic*, Decision on Jurisdiction and Admissibility, 17 November 2014, para. 305.

²⁹ *Ibid.*, para. 311.

³⁰ *Ibid.*, paras. 316-317.

³¹ One claimant was born in Spain and later acquired Venezuelan nationality; the other was born in Venezuela and later acquired Spanish nationality.

³² *Serafín García Armas and Karina García Gruber v. The Bolivarian Republic of Venezuela* (UNCITRAL), Decision on Jurisdiction, 15 December 2014, para. 180.

³³ *Ibid.*, paras. 193-196.

on the Law of Treaties and previous decisions of investment tribunals³⁴ to conclude that if the treaty did not impose any express limitation on dual nationals, it was “*not possible to devoid of effect the nationality granted freely by a State and accepted as valid by the other*”.³⁵ The tribunal refused to apply the test of “dominant and effective nationality” as it considered it to be part of the law of diplomatic protection and not applicable in the context of investment treaties.³⁶

Admission requirement

In *Churchill Mining v. Indonesia*, the tribunal determined that the requirement in Article 2(1) of the Indonesia-UK BIT, which limited the application of the BIT to investments that “*have been granted admission [is] a one-time occurrence, a gateway through [sic] all British investors must pass once*”.³⁷ It thus rejected the respondent’s argument that the requirement extends throughout the entire duration of the investment operation. Indonesia had argued that a “*foreign investor violates the admission requirement when engaging in activities that are not covered by the terms of the [original] approval*”.³⁸ Indonesia alleged that Churchill Mining engaged in actual mining activities, which were not included within the scope of the original approval of mining “services”.³⁹ But the tribunal rejected this argument and agreed with the claimant that the admission requirement embodied in Article 2(1) of the BIT “*applies at the time of entry into the country and not during the entire operation of the project [and] is narrower than a traditional legality requirement in the sense that it only demands admission in accordance with the relevant domestic laws and not general compliance with the host State’s legislation*”.⁴⁰

Jurisdictional objection based on allegations of fraud, illegal or bad faith conduct related to the investment

In *Minnotte and Lewis v. Poland*, the tribunal noted that, although the Poland-US BIT does not explicitly require the investment to be made in accordance with the host State’s law, “*it is now generally accepted that investments made on the basis of fraudulent conduct cannot benefit from BIT protection; and this is a principle that is independent of the effect of any express requirement in a BIT that the investment be made in accordance with the host State’s law*”.⁴¹ The tribunal however added that it is only the case “*where fraud is so manifest, and so closely connected to facts (such as the making of an investment) which form the basis of a tribunal’s jurisdiction as to warrant a dismissal of claims [...] for want of jurisdiction*”.⁴² The tribunal ultimately dismissed the jurisdictional objection as the circumstances in which the investment at issue was made were “*far from displaying such manifest fraud or other defects*”.⁴³

³⁴ In particular, the tribunal referred to *Oostergetel v. The Slovak Republic*, *Saluka v. Czech Republic*, *Pey Casado v. Chile*, and *Micula v. Romania* (*ibid.*, paras. 202-205).

³⁵ *Ibid.*, para. 200.

³⁶ *Ibid.*, para. 170; see also paras. 173-174.

³⁷ *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia* (ICSID Case No. ARB/12/14 and 12/40), Decision on Jurisdiction (Churchill Mining Plc), 24 February 2014, para. 289.

³⁸ *Ibid.*, para. 245.

³⁹ *Ibid.*, para. 258.

⁴⁰ *Ibid.*, paras. 290-291.

⁴¹ *David Minnotte & Robert Lewis v. Republic of Poland* (ICSID Case No. ARB(AF)/10/1), Award, 16 May 2014, para. 131, citing e.g., *Inceysa Vallisoletana, S.L. v. Republic of El Salvador* (ICSID Case No. ARB/03/26), Award, 2 August 2006, paras. 230-244 (where the Tribunal appears to treat fraud as a matter going to jurisdiction “because States cannot be supposed to have intended to give investments made fraudulently the benefit of BIT protection”).

⁴² *David Minnotte & Robert Lewis v. Republic of Poland* (ICSID Case No. ARB(AF)/10/1), Award, 16 May 2014, para. 132.

⁴³ *Ibid.*, para. 133.

In the *Yukos v. Russia* award,⁴⁴ the tribunal stated that there was “no compelling reason to deny altogether the right to invoke the [Energy Charter Treaty] to any investor who has breached the law of the host State [during the lifetime of] its investment”.⁴⁵ According to the *Yukos* tribunal, “if the investor acts illegally, the host state can request it to correct its behavior and impose upon it sanctions available under domestic law [and] if the investor believes these sanctions to be unjustified [...], it must have the possibility of challenging their validity in accordance with the applicable investment treaty.”⁴⁶ In the view of the *Yukos* tribunal, “It would undermine the purpose and object of the ECT to deny the investor the right to make its case before an arbitral tribunal based on the same alleged violations the existence of which the investor seeks to dispute on the merits.”⁴⁷

The *Yukos* tribunal noted that it was “not persuaded that there exists a general principle of law [...] that would bar an investor from making a claim before an arbitral tribunal under an investment treaty because it has so-called ‘unclean hands’”.⁴⁸ On the other hand, the majority of the tribunal in *Al Warraq v. Indonesia* affirmed that the “clean hands” doctrine rendered a claim inadmissible even if the investor breached the local laws after making the investment.⁴⁹ In that case, it was established that the claimant had committed six types of fraud in the investment banking sector (including the use of relevant bank assets to obtain private loans and replacing valuable assets with “trash” securities).⁵⁰ The tribunal concluded that these actions violated Indonesian laws and regulations and were “prejudicial to the public interest”.⁵¹ An assessment of investor compliance with the host State’s laws and regulations was specifically called for by the applicable treaty.⁵² In the final analysis, even though the tribunal found that the State’s conduct in the prosecution and conviction of the claimant breached the treaty, it decided that the investor “deprived himself of the protection afforded by the OIC Agreement” and refused to award damages.⁵³

In *Hochtief v. Argentina*, the respondent argued that the claimant’s loan transactions had not all been recorded as required by Argentine financial legislation and that, therefore, the loans had been made not in accordance with the laws and regulations of Argentina as required by Article 2(2) of the Argentina-Germany BIT. The *Hochtief* tribunal concluded that there is not “a sufficient basis for rejecting the claims concerning the loans on the

⁴⁴ This was one of three closely related, and almost identical, decisions (rendered by the same tribunal) involving the dispute between the three majority stakeholders of the former oil company Yukos and the Russian Federation: *Hulley Enterprises Limited (Cyprus) v. The Russian Federation* (UNCITRAL, PCA Case No. AA 226), Final Award, 18 July 2014; *Veteran Petroleum Limited (Cyprus) v. The Russian Federation* (UNCITRAL, PCA Case No. AA 228), Final Award, 18 July 2014; *Yukos Universal Limited (Isle of Man) v. The Russian Federation* (UNCITRAL, PCA Case No. AA 227), Final Award, 18 July 2014.

⁴⁵ *Yukos Universal Limited (Isle of Man) v. The Russian Federation* (UNCITRAL, PCA Case No. AA 227), Final Award, 18 July 2014, para. 1355.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*, para. 1358.

⁴⁹ *Hesham T.M. Al Warraq v. Republic of Indonesia* (UNCITRAL), Final Award, 15 December 2014, paras. 645-647. The dissenting arbitrator maintained that the doctrine of “clean hands” applies only if the illegality relates to the acquisition of the investment. *Ibid.*, para. 683, fn. 217.

⁵⁰ *Ibid.*, paras. 634-640.

⁵¹ *Ibid.*, para. 645.

⁵² Article 9 of the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference (1981) provides: “The investor shall be bound by the laws and regulations in force in the host state and shall refrain from all acts that may disturb public order or morals or that may be prejudicial to the public interest. He is also to refrain from exercising restrictive practices and from trying to achieve gains through unlawful means.”

⁵³ *Hesham T.M. Al Warraq v. Republic of Indonesia* (UNCITRAL), Final Award, 15 December 2014, para. 645.

basis of their non-registration under Argentine regulations”.⁵⁴ The tribunal noted that in previous cases, tribunals have focused on compliance with “fundamental principles of the host State’s law”.⁵⁵ In the tribunal’s view, “investments that are [...] dependent upon government approvals that were not in fact obtained, or which were effected by fraud or corruption can be caught by a provision such as Article 2(2) of the Argentina-Germany BIT. But not every technical infraction of a State’s regulations associated with an investment will operate so as to deprive that investment of the protection of a Treaty that contains such a provision.”⁵⁶

Treaty shopping: difference between the abuse of process doctrine and an objection to jurisdiction *ratione temporis*

In *Lao Holding v. Laos*, the Government argued that the claimant was incorporated in Aruba (the Netherlands) as an “opportunistic device” after the dispute (over the New Tax Code) arose, with the aim to gain access to the rights and remedies afforded by the Laos-Netherlands BIT.⁵⁷ Having analysed the facts, the tribunal concluded that the investment restructuring had been made some time *before* the dispute actually materialized.

The *Lao Holding* tribunal explained that “if a company changes its nationality in order to gain ICSID jurisdiction at a moment when things have started to deteriorate so that a dispute is highly probable, it can be considered an abuse of process. However, for an objection based on *ratione temporis* to be upheld, the dispute has to have actually arisen before the critical date to conform to the general principle of non retroactivity in the interpretation and application of international treaties.”⁵⁸

The arbitrators strongly emphasised that the respondent objected to tribunal’s jurisdiction on *ratione temporis* grounds and did *not* ask to dismiss the case for abuse of process. The tribunal thus stated: “the question could have been discussed whether a dispute was foreseeable before the change of nationality, if an objection had been raised on the basis of an abuse of process. However, as the only objection to jurisdiction was based on *ratione temporis* issues, the only task of the Tribunal is to determine the moment when the dispute arose.”⁵⁹ Having found that the change of nationality occurred before the dispute arose (at that time, the application of the New Tax Code “was a mere possibility that was not yet ripe for a ‘legal dispute’ to arise”⁶⁰), the tribunal rejected the respondent’s argument and affirmed its jurisdiction over the case.⁶¹

⁵⁴ *Hochtief AG v. The Argentine Republic* (ICSID Case No. ARB/07/31), Decision on Liability, 29 December 2014, para. 200.

⁵⁵ *Ibid.*, para. 199; citing *Desert Line Projects LLC v. Republic of Yemen* (ICSID Case No. ARB/05/17), Award, 6 February 2008, para. 104, *Inceysa Vallisoletana S.L. v. Republic of El Salvador* (ICSID Case No. ARB/03/26), Award, 2 August 2006; *Fraport AG Frankfurt Airport Services Worldwide v. Philippines* (ICSID Case No. ARB/03/25), Award, 16 August 2007.

⁵⁶ *Hochtief AG v. The Argentine Republic* (ICSID Case No. ARB/07/31), Decision on Liability, 29 December 2014, para. 199.

⁵⁷ *Lao Holdings N.V. v. Lao People’s Democratic Republic* (ICSID Case No. ARB(AF)/12/6), Decision on Jurisdiction, 21 February 2014, para. 65.

⁵⁸ *Ibid.*, para. 76.

⁵⁹ *Ibid.*, para. 83.

⁶⁰ *Ibid.*, para. 158.

⁶¹ See also *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica* (ICSID Case No. ARB/13/2), Decision on Jurisdiction, 15 December 2014, paras. 292-308, where the tribunal rejected the respondent’s objection that the claimants’ ultimate parent, the Mexican Zeta Group, had restructured its investment for the sole purpose of gaining access to ICSID arbitration. The tribunal, first, confirmed that a corporate restructuring made with the sole purpose to gain access to ICSID jurisdiction over a foreseeable dispute would constitute an abuse of rights. It considered, however, that even though the claimants had not provided precise explanations as to the reasons behind the corporate restructuring, in fact they did not have the obligation to do so since the burden of proof on this matter rested upon the respondent, which had failed to meet its burden. See similarly, *Renée Rose Levy de Levi v. Republic of Peru* (ICSID Case No. ARB/10/17), Award, 26 February 2014, para. 154.

Overlapping claims and abuse of process

In a 2013 jurisdictional decision that became public in 2014, the tribunal in *Sanum v. Laos* rejected the respondent's claim that the pursuit of overlapping claims in two different arbitral tribunals established under two different BITs by different (but related) parties constitutes an abuse of process and causes prejudice to the respondent. The *Sanum* tribunal found the fact that the respondent State had refused to consolidate the *Sanum* proceedings with the related *Lao Holding* arbitration was sufficient ground to reject the abuse of process claim.⁶²

Making an investment “in the territory of” the host State

In *Gold Reserve v. Venezuela*, the respondent argued that the process leading to the indirect share ownership by the claimant of a local subsidiary and, through the latter, of title to mining rights and concessions did not satisfy the condition of “making an investment in the territory of Venezuela” under the Canada-Venezuela BIT.⁶³ The tribunal rejected the argument. It found that “[a]ccording to the ordinary meaning of the words, ‘making an investment in the territory of Venezuela’ does not require that there must be a movement of capital or other values across Venezuelan borders”.⁶⁴ In the view of the *Gold Reserve* tribunal, “[i]f such a condition were inferred it would mean that an existing investment in Venezuela, owned or controlled by a non-Venezuelan entity, would not be protected by the BIT if it were acquired by a third party, with cash or other consideration being paid outside Venezuela, even if the acquiring party then invested funds into Venezuela to finance the activity of the acquired business. Clearly, this was not the intention of the parties to the BIT and nor does it reflect the ordinary meaning of the definition.”⁶⁵

Multi-party proceedings

In *Giovanni Alemanni v. Argentina*, the respondent claimed that multi-party disputes could not be adjudicated on the basis of the ICSID Convention. The tribunal was faced with the question of whether the phrase in Article 25(1) of the ICSID Convention “dispute arising directly out of an investment, between a Contracting State [...] and a national of another Contracting State” denotes a “dispute between a Contracting State and one, but only one, national of another Contracting State.”⁶⁶ The tribunal concluded that there was “no reasonable basis for implying into the text as it stands of Article 25(1) the additional words ‘but only one’.”⁶⁷ However, the tribunal noted that the question whether the respondent consented to the proceedings at hand “is intimately wrapped up in the notion of a ‘dispute’”.⁶⁸ Reiterating its opinion that it is possible for a “dispute” to include more than one party on the claimant side, the tribunal observed that “the interest represented on each side of the dispute has to be in all essential respects identical for all of those involved on that side of the dispute.”⁶⁹ In this case, it could not determine during this preliminary phase whether “the actual rights of all of the Claimants” and “the actual effect” on those rights of the respondent's conduct “were sufficiently

⁶² *Sanum Investments Limited v. Lao People's Democratic Republic* (UNCITRAL, PCA Case No. 2013-13), Award on Jurisdiction, 13 December 2013, para. 367.

⁶³ *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/09/1), Award, 22 September 2014, para. 261.

⁶⁴ *Ibid.*, para. 262.

⁶⁵ *Ibid.*, para. 263.

⁶⁶ *Giovanni Alemanni and Others v. The Argentine Republic, Decision on Jurisdiction and Admissibility*, 17 November 2014, para. 270.

⁶⁷ *Ibid.*, para. 271.

⁶⁸ *Ibid.*, para. 280.

⁶⁹ *Ibid.*, para. 292.

the same as to amount to a single ‘dispute’” and consequently left this determination for the merits phase.⁷⁰

“Retrospective” exercise of a denial-of-benefits clause

The tribunal in *Guaracachi America Inc. and Rurelec PLC v. Bolivia* held that it lacked jurisdiction over the claims brought by one of the two claimants, Guaracachi America Inc. (GAI), under the Bolivia-United States BIT due to the respondent’s invocation of denial-of-benefits clause in its statement of defense. The tribunal first noted that “[w]henever a BIT includes a denial of benefits clause, the consent by the host State to arbitration itself is conditional and thus may be denied by it, provided that certain objective requirements concerning the investor are fulfilled”.⁷¹ The tribunal explained that “the denial can and usually will be used whenever an investor decides to invoke one of the benefits of the BIT. It will be on that occasion that the respondent State will analyse whether the objective conditions for the denial are met and, if so, decide on whether to exercise its right to deny the benefits contained in the BIT, up to the submission of its statement of defence.”⁷² While the approach adopted by this tribunal mirrors that in the 2012 decision in *Pac Rim Cayman v. El Salvador*,⁷³ it contradicts the approach followed in the 2010 decision in *Liman Caspian v. Kazakhstan*⁷⁴ and in the 2013 decision in *Stati & Ascom v. Kazakhstan*,⁷⁵ where the tribunals did not accept “retrospective” application of the denial-of-benefits clause.

Sovereign conduct vs. commercial conduct

The tribunal in *Tulip v. Turkey* noted that, for purposes of establishing the jurisdiction of the tribunal under a BIT, the respondent’s conduct “must be capable of characterization as sovereign conduct, involving the invocation of *puissance publique*”.⁷⁶ The *Tulip* tribunal found that there was “no persuasive evidence before the Tribunal that Emlak [a Turkish State-controlled real estate investment trust] went beyond acting as an ordinary contractual party in pursuit of its commercial best interests.”⁷⁷ Accordingly, the tribunal concluded that those acts “[fell] outside the scope of the Tribunal’s jurisdiction”.⁷⁸

Attribution of conduct to a respondent State

The tribunal in *Yukos v. Russia* found that the actions of Rosneft (a Russian State-owned company that acquired most of the remaining assets of

⁷⁰ *Ibid.*, para. 293. The earlier *Abaclat* tribunal was the first one to accept jurisdiction over a similar multi-party dispute. The *Abaclat* tribunal considered that the multiplicity of claimants relates to the question of admissibility rather than jurisdiction and in light of the fact that the ICSID Convention remains silent on the topic, the *Abaclat* tribunal noted that it had the power on the basis of Article 44 of the ICSID Convention to “fill this gap”. *Abaclat and Others v. The Argentine Republic*, Decision on Jurisdiction and Admissibility, 4 August 2011, paras. 492-520.

⁷¹ *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia* (UNCITRAL, PCA Case No. 2011-17), Award (corrected), 31 January 2014, para. 372.

⁷² *Ibid.*, para. 378.

⁷³ *Pac Rim Cayman LLC v. Republic of El Salvador* (ICSID Case No. ARB/09/12), Decision on the Respondent’s Jurisdictional Objections, 1 June 2012, para. 4.85.

⁷⁴ *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan* (ICSID Case No. ARB/07/14), Award (excerpts), 22 June 2010, para. 225.

⁷⁵ *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Trading Ltd v. Republic of Kazakhstan* (SCC), Award, 19 December 2013, para. 745. Similarly, see *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24), Decision on Jurisdiction, 8 February 2005, paras. 161-162; *Veteran Petroleum Limited (Cyprus) v. The Russian Federation* (UNCITRAL, PCA Case No. AA 228), Interim Award on Jurisdiction and Admissibility, 30 November 2009, paras. 514-515.

⁷⁶ *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey* (ICSID Case No. ARB/11/28), Award, 10 March 2014, para. 354.

⁷⁷ *Ibid.*, para. 361.

⁷⁸ *Ibid.*, para. 361.

Yukos) were attributable to the respondent on the basis of Article 8 of the International Law Commission (ILC) Articles on State Responsibility, which provides that “[t]he conduct of a person or group of persons shall be considered an act of State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction and control of, that State in carrying out the conduct.” The tribunal first noted that the fact that (a) the Russian State owned all, or, subsequently, over 70 percent of the shares of Rosneft; (b) Rosneft’s officers were and are appointed by the State; and (c) many members of Rosneft’s Board of Directors concurrently occupied and occupy senior executive positions in Government, some close to President Putin, was not sufficient to prove that Rosneft took the actions under review at the instructions or direction, or under the control of the Russian State.⁷⁹ The tribunal added, however, that it found proof of direction or control in a President Putin’s statement that the State was “resorting to absolutely legal market mechanisms, [and] looking after its own interests” with regard to Rosneft’s purchase of the Yuganskneftegaz (YNG) shares from Baikal Finance Group.⁸⁰ In the view of the Yukos tribunal, that statement constituted President Putin’s public acceptance and assertion that Rosneft’s purchase of the shares of YNG, the main production subsidiary of Yukos, from Baikal Finance Group was an action in the State’s interest. The tribunal inferred that the State, then 100 per cent shareholder of Rosneft, the most senior officers of which were members of President Putin’s entourage, directed that purchase in the interest of the State.⁸¹

The most-favoured-nation (MFN) clause as it applies to jurisdictional matters

In *Sanum v. Laos*, the tribunal rejected the claimant’s argument to employ a narrowly worded MFN clause in the China-Laos BIT82 to extend access to international arbitration. The tribunal noted that “to read into [the MFN] clause a dispute settlement provision to cover all protections under the Treaty when the Treaty itself provides for very limited access to international arbitration would result in a substantial re-write of the Treaty and an extension of the States Parties’ consent to arbitration beyond what may be assumed to have been their intention, given the limited reach of the Treaty protection and dispute settlement clauses.”⁸³

B. Substantive issues

Definition of “in like circumstances” for purposes of the national treatment provision

When interpreting the phrase “in like circumstances” in the national treatment provision of NAFTA, the tribunal in *Apotex Holdings Inc. and*

⁷⁹ *Yukos Universal Limited (Isle of Man) v. The Russian Federation* (UNCITRAL, PCA Case No. AA 227), Final Award, 18 July 2014, paras. 1468-1469.

⁸⁰ *Ibid.*, para. 1006.

⁸¹ *Ibid.*, para. 1472.

⁸² Article 3 of the China-Laos BIT provides in the relevant part: “(1) Investments and activities associated with investments of investors of either Contracting State shall be accorded fair and equitable treatment and shall enjoy protection in the territory of the other Contracting State. (2) The treatment and protection as mentioned in Paragraph 1 of this Article shall not be less favorable than that accorded to investments and activities associated with such investments of investors of a third State. Investments and activities associated with investments of investors of either Contracting State shall be accorded fair and equitable treatment and shall enjoy protection in the territory of the other Contracting State.”

⁸³ *Sanum Investments Limited v. Lao People’s Republic* (UNCITRAL, PCA Case No. 2013-13), Award on Jurisdiction, 13 December 2013, para. 358. Article 8(3) of the China-Laos BIT allows only “disputes involving the amount of compensation for expropriation” to be submitted to international arbitration.

Apotex Inc. v. United States followed the approach taken in *Grand River*⁸⁴ that the relevant comparators must be subject to like legal requirements. Despite the fact that all three domestic comparators proposed by the claimants were in the same sector as the claimants, sold like drug products to those sold by Apotex Inc., and were direct competitors in the US market,⁸⁵ the *Apotex* tribunal concluded that they were not “in like circumstances” with the claimants because there were material differences in the legal and regulatory regimes applicable to them. These differences arose from the fact that the claimants’ manufacturing facilities were located outside the US, while the domestic comparators had their facilities in the US. The tribunal went on to hold that the relevant regulatory differences were rationally justified and, therefore, found no violation of the national treatment obligation.⁸⁶

The customary minimum standard of treatment of aliens

Having acknowledged the varying approaches taken by past NAFTA tribunals with regard to due process as part of the customary minimum standard of treatment, the *Apotex v. United States* tribunal observed that these past NAFTA tribunals “*have emphasized that a high threshold of severity and gravity is required in order to conclude that the host state has breached any of the elements contained within the FET standard under Article 1105*”.⁸⁷ The *Apotex* tribunal concluded that the claimants failed to establish that the respondent’s conduct rose to such threshold of severity and gravity, particularly in light of the claimants’ decisions not to pursue either administrative or judicial remedies to contest the allegedly improper action by the United States Food and Drug Administration.⁸⁸ While this approach seems to mirror the similar reading of the customary minimum standard of treatment by the tribunals in *Glamis Gold v. United States*⁸⁹ and *Teco v. Guatemala*,⁹⁰ it contrasts with the broader reading followed by the tribunal in *Merrill & Ring v. Canada*.⁹¹

Fair and equitable treatment (FET) and investor’s legitimate expectations

Several decisions under review focused on the protection of investor’s legitimate expectations as part of the FET standard.

In *Gold Reserve v. Venezuela*, the tribunal had to interpret Article II(2) of the Canada-Venezuela BIT which reads as follows: “*Each Contracting Party shall, in accordance with the principles of international law, accord investments or returns of investors of the other Contracting Party fair and equitable treatment [...]*.” In order to determine the “principles of international law”, the *Gold Reserve* tribunal noted, first, that it “*must consider the present status of development of public international law in the field of investment protection*” and, second, that “*public international law principles have evolved since the Neer case and that the standard*

⁸⁴ *Grand River Enterprises Six Nations, Ltd. et al. v. United States of America* (UNCITRAL), Award (redacted version), 12 January 2011, para. 166.

⁸⁵ *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (ICSID Case No. ARB(AF)/12/1), Award, 25 August 2014, para. 8.43.

⁸⁶ *Ibid.*, paras. 8.51-8.58.

⁸⁷ *Ibid.*, para. 9.47.

⁸⁸ *Ibid.*, para. 9.65.

⁸⁹ *Glamis Gold, Ltd. v. The United States of America* (UNCITRAL), Award, 8 June 2009, para. 616.

⁹⁰ *TECO Guatemala Holdings, LLC v. Republic of Guatemala* (ICSID Case No. ARB/10/23), Award, 19 December 2013, para. 493.

⁹¹ In *Merrill & Ring Forestry L.P. v. The Government of Canada* (UNCITRAL), Award, 31 March 2010, paras. 210-223, the tribunal stated that – in the context of business, trade, and investment – treatment need not be shocking; it is sufficient that the treatment infringes a sense of fairness, equality, and reasonableness.

today is broader than that defined in the *Neer* case on which Respondent relies.”⁹² The *Gold Reserve* tribunal implicitly concluded, in particular, that the protection of “legitimate expectations”, which the tribunal found to exist in “many domestic legal systems”, forms part of public international law today.⁹³

In a decision rendered in 2012 and made public in 2014, the tribunal in *Achmea v. Slovak Republic I* found that the host State’s “de-liberalisation” of the Slovak health insurance market, which included a ban on distribution of profits and a ban on selling (transferring) the insurance portfolio to another health insurance company, violated the FET standard in the Netherlands-Slovakia BIT. While it never expressly referred to the concept, the *Achmea* tribunal’s finding on FET is principally based on the protection of the investor’s expectations. In its findings, the tribunal emphasized that (a) the ability to distribute profits was an essential precondition of the claimant’s decision to invest; (b) had the claimant’s management been aware of a real possibility that a ban on profits was about to be introduced after the 2007 election, the investment would not have been made at all; (c) while the claimant’s management were aware of the possibility of far-reaching reforms being introduced in the organisation of health insurance in the Slovak Republic, they were not aware that such reforms would include a ban on profits and a ban on transfer that would prevent the realisation of any profits from their investment.⁹⁴

Interestingly, the *Achmea* tribunal concluded its FET analysis by emphasizing, on the one hand, that the investment treaty is not hostile towards particular policies on the provision of healthcare facilities and that contracting parties “are free to adopt the policies that they choose”.⁹⁵ On the other hand, the *Achmea* tribunal also stated that the investment treaty “focuses on the manner in which policies may be changed and implemented, not on the policies themselves. The decision in a case such as the present could be very different if, for example, reforms had been introduced in a phased manner together with provision for the compensation of any private health insurance providers who were caused loss by the reforms.”⁹⁶

In setting out its stance on the investor’s legitimate expectations under the FET provision, the tribunal in *Perenco v. Ecuador* emphasized that “[t]he search is for a balanced approach between the investor’s reasonable expectations and the exercise of the host State’s regulatory and other powers.”⁹⁷ The measures at issue in that case included windfall profit taxes at 50 per cent and 99 per cent. While the tribunal recognized that the policy framework is not frozen and can be changed, it also noted that, even “where there is no full stability clause in its contracts, any

⁹² *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/09/1), Award, 22 September 2014, para. 567.

⁹³ *Ibid.*, paras. 567-576.

⁹⁴ *Achmea B.V. v. The Slovak Republic* (UNCITRAL, PCA Case No. 2013-12) (Number 2)), Award on Jurisdiction and Admissibility, 20 May 2014, paras. 280-282. However, the claimant had expressly referred to the concept of investor’s legitimate expectations: “According to Claimant, the obligation imposed on the host State is also linked to legitimate expectations. Although a State is not barred from introducing any change to its laws and regulations, it may not ‘by amending its legal framework exceed what the investor justifiably expected at the time of making its investment’.”

⁹⁵ *Ibid.*, para. 294.

⁹⁶ *Ibid.* The tribunal added: “Indeed, the Contracting Parties could go further, and exclude health care altogether from the coverage of the BIT if they so wish. But as long as the provisions of the Treaty remain in force and applicable, they must be respected. That is what the Governments of the Contracting Party intended when they chose to conclude the Treaty, for what they judged to be the benefit of their States and their nationals.”

⁹⁷ *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)* (ICSID Case No. ARB/08/6), Decision on Remaining Issues of Jurisdiction and Liability, 12 September 2014, para. 560.

changes to the policy framework must be made mindful of the State's contractual commitments.”⁹⁸ The tribunal continued its reasoning as follows: “Particularly after changes in government occur, States must seek to act consistently with, and governments cannot wilfully repudiate, long-term commercial relationships with foreign investors concluded by their predecessors. New governments must bear in mind why the State engaged in such relationships in the first place, because resource extraction and other capital-intensive investments with substantial ‘up-front’ costs generally require a medium to long-term period of operations in order to be able to generate a reasonable return on investment. Such investments must be able to withstand deviations in governmental policy that could undermine their contractual framework.”⁹⁹ Eventually, the tribunal found that while the tax at 50 per cent had not breached the FET provision,¹⁰⁰ the tax at 99 per cent had.¹⁰¹

The decision in the *Minnotte and Lewis v. Poland* case turned on the specificity of expectations. In the view of the tribunal, “[w]hile there may, arguably, be a general expectation that States will observe basic standards such as reasonable consistency and transparency, more specific expectations must be specifically created and proved.”¹⁰² In that case, the claimants had alleged that there was a legitimate expectation that the respondent would provide blood plasma under the 1997 Fractionation Agreement. However, in the view of the *Minnotte* tribunal, the claimants “need to show, not merely that there was a legitimate expectation that blood plasma would be provided, but more precisely that there was a legitimate expectation that it would be provided on demand or at a specific time for the purposes of testing abroad prior to the completion of the fractionation facility in Poland”.¹⁰³ The tribunal rejected the claim as the claimants failed to provide any documentary, or specific evidential support for their alleged expectation.¹⁰⁴

Fair and equitable treatment and denial of justice

The *Flughafen v. Venezuela* tribunal stated that the prohibition of denial of justice constitutes part of the fair and equitable treatment standard¹⁰⁵ and is also part of customary international law.¹⁰⁶ The tribunal noted that to establish a denial of justice, two elements are necessary: (a) a judicial system that treats foreign investors in a clearly and manifestly anti-judicial manner, and (b) the fact that the foreign investor has exhausted all internal legal remedies to challenge the anti-judicial decision (unless the investor has proved that such remedies would be futile).¹⁰⁷ Under the circumstances, the *Flughafen* tribunal found that there had been a denial of justice.¹⁰⁸

⁹⁸ *Ibid.*, para. 562.

⁹⁹ *Ibid.*, para. 564.

¹⁰⁰ “The market conditions in which the State acted were, in the Tribunal’s view, quite extraordinary and the widespread array of measures taken by other States during this time satisfies the Tribunal that seeking an adjustment of the economic rent derived from exhaustible natural resources was not per se arbitrary, unreasonable or idiosyncratic.” *Ibid.*, para. 591.

¹⁰¹ “[T]he application of the law at 99% rendered a participation contract essentially the same as a service contract. [...] In the Tribunal’s view, moving beyond 50% to 99% with the application of Decree 662 amounted to a breach of Article 4 of the Treaty.” *Ibid.*, paras. 606-607.

¹⁰² *David Minnotte & Robert Lewis v. Republic of Poland* (ICSID Case No. ARB(AF)/10/1), Award, 16 May 2014, para. 193.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*, paras. 194, 196.

¹⁰⁵ *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/19), Award, 18 November 2014, paras. 376, 600, 630.

¹⁰⁶ *Ibid.*, paras 378, 631, 633.

¹⁰⁷ *Ibid.*, paras 708, 721.

¹⁰⁸ *Ibid.*, para. 365.

Rights capable of being expropriated

The tribunal in *Emmis v. Hungary* rejected the expropriation claim as the claimants failed to show that the rights alleged to arise directly from participation in a radio license tendering process could be said to be assets or property owned or controlled by the claimants.¹⁰⁹ The *Emmis* tribunal held that the legal position under international law is the following: “[T]he loss of a right conferred by contract may be capable of giving rise to a claim of expropriation but only if it gives rise to an asset owned by the claimant to which a monetary value may be ascribed. The claimant must own the asset at the date of the alleged breach. It is the asset itself - the property interest or chose in action - and not its contractual source that is the subject of the expropriation claim. Contractual or other rights accorded to the investor under host state law that do not meet this test will not give rise to a claim of expropriation.”¹¹⁰

Non-payment of compensation as a criterion for unlawful expropriation

The tribunal in *Guaracachi and Rurelec v. Bolivia* found that the respondent had “unlawfully” expropriated the claimant’s investment because it did not provide just and effective compensation. The *Guaracachi* tribunal reasoned as follows: “[A]ny State which carries out an expropriation is expected to accurately and professionally assess the true value of the expropriated assets. Bolivia did not actually compensate (or intend to compensate) Rurelec as it did not make an accurate assessment of EGSA’s [Empresa Electrica Guaracachi S.A.] value at the time. In fact, it did quite the opposite, and if the Tribunal finds the valuation to be ‘manifestly inadequate’, this is Bolivia’s responsibility.”¹¹¹ As it found that this was in fact the case, the tribunal concluded that the expropriation was therefore illegal.¹¹²

Extent of deprivation in cases of indirect expropriation

At least two decisions rendered in 2014 seem to restrict the definition of an indirect expropriation based on the adverse effect on the investment. The tribunal in *Perenco v. Ecuador* emphasized the distinction between “partial deprivation of value”, which does not constitute an expropriation, and “complete or near complete deprivation of value”, which can constitute an expropriation.¹¹³ The tribunal found that neither the respondent’s windfall profit tax at 50 per cent nor the windfall profit tax at 99 per cent constituted an indirect expropriation. When discussing the 99 per cent tax, the tribunal cited earlier decisions, according to which “the effect of the alleged expropriatory measures [should come] close to extinguishing the investor’s business”;¹¹⁴ and “an expropriation requires very great loss or impairment of all of a claimant’s investment.”¹¹⁵ The tribunal held that,

¹⁰⁹ *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEMMagyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary* (ICSID Case No. ARB/12/2), Award, 16 April 2014, para. 254.

¹¹⁰ *Ibid.*, para. 169.

¹¹¹ *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia* (UNCITRAL, PCA Case No. 2011-17), Award (corrected), 31 January 2014, para. 441.

¹¹² *Ibid.*

¹¹³ *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)* (ICSID Case No. ARB/08/6), Decision on Remaining Issues of Jurisdiction and Liability, 12 September 2014, para. 672.

¹¹⁴ *Ibid.*, para. 682. Citing *Grand River Enterprises Six Nations, Ltd. et al. v. United States of America* (UNCITRAL), Award (redacted version), 12 January 2011, para. 151.

¹¹⁵ *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)* (ICSID Case No. ARB/08/6), Decision on Remaining Issues of Jurisdiction and Liability, 12 September 2014, para. 682-683.

while the financial burden of paying 99 per cent of the revenues above the reference price was “disadvantageous to Perenco, [it] did not bring its operation to a halt”.¹¹⁶

Similarly, the tribunal in *Venezuela Holdings B.V., Mobil Cerro Negro Holding LTD et al v. Venezuela* stated that “under international law, a measure which does not have all the features of a formal expropriation may be equivalent to an expropriation if it gives rise to an effective deprivation of the investment as a whole. Such a deprivation requires either a total loss of the investment’s value or a total loss of control by the investor of its investment, both of a permanent nature.”¹¹⁷ The *Mobil* tribunal rejected the expropriation claim as the claimant had not been able to show that the host State measure under review had such an impact.¹¹⁸

“Stepping out of the contractual shoes” requirement for a finding of contractual expropriation

The tribunal in *Vigotop v. Hungary* set out the issues pertinent to determining whether a contract termination amounts to an expropriation as follows: “(i) whether the contract is terminated by the contractual procedure rather than a legislative act or executive decree, and (ii) whether there exists a legitimate contractual basis for termination, i.e., (a) the contract or the governing law provides the ground for termination, (b) the evidence substantiates a factual basis for invoking the contractual ground, and (c) the State acts in good faith, not abusing its right by a fictitious or malicious exercise of it.”¹¹⁹ Accordingly, in a situation in which the respondent had both a public policy reason and a contractual reason for terminating the concession contract, in the view of the *Vigotop* tribunal, the claimant’s expropriation claim could only be successful if it proved that the respondent exercised its contractual termination right contrary to good faith or abused such right in order to avoid its liability to compensate under the treaty. On the balance of the evidence, the tribunal found that the claimant failed to discharge its burden of proof that there was such conduct on the part of the respondent.¹²⁰

C. Compensation

At least eight decisions rendered in 2014 awarded compensation to investors. The highest amounts (which also constitute the highest ever awards in an investment treaty arbitration) featured in the three closely related decisions (rendered by the same tribunal) involving the long-standing dispute between the three majority stakeholders of the former oil company Yukos and the Russian Federation. In those decisions, *Hulley Enterprises Ltd* was awarded approximately US\$ 40 billion; *Veteran Petroleum Ltd* was awarded approximately US\$ 8.2 billion; and *Yukos Universal Ltd* was awarded approximately US\$ 1.8 billion.¹²¹

¹¹⁶ *Ibid.*, para. 685.

¹¹⁷ *Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27), Award, 9 October 2014, para. 286.

¹¹⁸ *Ibid.*, para. 287.

¹¹⁹ *Vigotop Limited v. Hungary* (ICSID Case No. ARB/11/22), Award, 1 October 2014, para. 331.

¹²⁰ *Ibid.*, para. 630.

¹²¹ *Hulley Enterprises Limited (Cyprus) v. The Russian Federation* (UNCITRAL, PCA Case No. AA 226), Final Award, 18 July 2014; *Veteran Petroleum Limited (Cyprus) v. The Russian Federation* (UNCITRAL, PCA Case No. AA 228), Final Award, 18 July 2014; *Yukos Universal Limited (Isle of Man) v. The Russian Federation* (UNCITRAL, PCA Case No. AA 227), Final Award, 18 July 2014.

In *Mobil Corporation and Others v. Venezuela*, the investors were awarded approximately US\$ 1.6 billion (net of any Venezuelan tax), increased by annually compounded interest at the rate of 3.25 per cent. This decision became the third highest award in investment treaty arbitration (counting the above three Yukos-related awards as one). The *Gold Reserve v. Venezuela* tribunal awarded the claimant approximately US\$ 713 million increased by annually compounded interest at the United States Government Treasury Bill Rate. The *SAUR v. Argentina* tribunal awarded the claimant approximately US\$ 40 million plus annually compounded interest at the rate of 6 per cent. In *Guaracachi and Ruralec v. Bolivia*, the tribunal awarded Ruralec compensation in the sum of approximately US\$ 29 million increased by annually compounded interest at the rate of 5.6 per cent. In *Flughafen v. Venezuela* each of the two claimants were awarded approximately US\$ 9.7 million with interest at the LIBOR plus 4 per cent rate.

Whether the risk of expropriation should be factored in the discounted cash flow (DCF) valuation method (to decrease compensation for an expropriated investment)

There was agreement among the three tribunals ordering Venezuela to pay compensation for expropriated assets that a country's political risk is a legitimate factor to be taken into account in calculating the discount rate for purposes of applying the DCF method. However, the arbitrators in these three cases adopted different positions with regard to the relevance of the expropriation risk. The *Mobil Corporation and Others v. Venezuela* tribunal found that the risk of confiscation “remains part of the country risk and must be taken into account in the determination of the discount rate”.¹²² On the other hand, the *Gold Reserve v. Venezuela* tribunal excluded the expropriation risk as it found that “it is not appropriate to increase the country risk premium to reflect the market's perception that a State might have a propensity to expropriate investments in breach of BIT obligations.”¹²³ The *Flughafen v. Venezuela* tribunal appears to have adopted a third, middle-of-the-road approach, whereby the expropriation risk (like any other political risk) should be taken into account in the calculation of the discount rate *only if* it existed at the time the investment was made.¹²⁴ The *Flughafen* tribunal explained that a State cannot benefit from an increase in the country risk (leading to a lower compensation) due to the adoption of certain measures, in violation of international law, undertaken after the investment had been made.¹²⁵

D. Decisions on challenges to arbitrators

At least nine decisions were rendered in 2014 on the proposal to disqualify one or more members of the arbitral tribunal.¹²⁶ Of the five decisions that are public (all rendered in the context of ICSID proceedings), four rejected

¹²² *Mobil Corporation, Venezuela Holdings B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27), Award, 9 October 2014, para. 365.

¹²³ *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/09/1), Award, 22 September 2014, para. 841.

¹²⁴ *Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/10/19), Award, 18 November 2014, para. 907.

¹²⁵ *Ibid.*, para. 905.

¹²⁶ In one additional case, the arbitrator resigned following the request for his disqualification. In his resignation letter, Mr. Sands rejected the grounds for the challenge, but stated that he did not want to be a cause of distraction in the case. See *Victor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No. ARB/98/2), Philippe Sands' Letter of Resignation from the Tribunal, 10 January 2014.

the proposal to disqualify,¹²⁷ and one upheld such proposal.¹²⁸ One ground frequently invoked is the so-called “issue conflict”, or an alleged pre-judgment of an issue due to the fact that the same arbitrator served in a different (earlier or parallel) case or cases. This ground for disqualification was addressed in two decisions rendered in 2014, with opposite results.

The two unchallenged arbitrators in *Caratube* accepted the proposal to disqualify Mr. Boesch, after deciding that “a third party would find that there is an evident or obvious appearance of lack of impartiality or independence based on a reasonable evaluation of the facts in the present case.”¹²⁹ The claimants challenged Mr. Boesch due to his participation in an earlier dispute, *Ruby Roz Agricol v. Kazakhstan* (a non-treaty case where the claims were dismissed on jurisdictional grounds),¹³⁰ arguing that his exposure to factual evidence in that case posed a manifest risk of pre-judgment regarding the jurisdiction and merits in the arbitration at hand.¹³¹ The two unchallenged arbitrators agreed with the claimants. They noted that, even though there were differences between the two cases, a number of important elements of the underlying fact pattern were the same. In particular, the claimants would rely on the same witness statements, the same alleged instances of frivolous criminal proceedings, and the same examples of state harassment.¹³² As a result of the overlap in facts and legal issues, the remaining arbitrators concluded that “independently of Mr. Boesch’s intentions and best efforts to act impartially and independently – a reasonable and informed third party would find it highly likely that, due to his serving as arbitrator in the Ruby Roz case and his exposure to the facts and legal arguments in that case, Mr. Boesch’s objectivity and open-mindedness with regard to the facts and issues to be decided in the present arbitration are tainted. In other words, a reasonable and informed third party would find it highly likely that Mr. Boesch would prejudge legal issues in the present arbitration based on the facts underlying the Ruby Roz case.”¹³³

On the other hand, in *İçkale İnşaat Limited Şirketi v. Turkmenistan*, the two unchallenged arbitrators rejected the claimant’s challenge of Professor Sands. Prof. Sands had previously served as an arbitrator in the *Kilic* case against Turkmenistan, in which the tribunal ruled that the Turkey-Turkmenistan BIT required the claimant to submit its dispute to local

¹²⁷ *Abaclat and Others v. Argentine Republic* (formerly *Giovanna a Beccara and Others v. The Argentine Republic*) (ICSID Case No. ARB/07/5), Decision on the Proposal to Disqualify a Majority of the Tribunal, 4 February 2014; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30), Decision on the Proposal to Disqualify a Majority of the Tribunal, 5 May 2014; *İçkale İnşaat Limited Şirketi v. Turkmenistan* (ICSID Case No. ARB/10/24), Decision on Claimant’s Proposal to Disqualify Professor Philippe Sands, 11 July 2014; *RSM Production Corporation v. Saint Lucia* (ICSID Case No. ARB/12/10), Decision on Claimant’s Proposal for the Disqualification of Dr. Gavan Griffith QC, 23 October 2014.

¹²⁸ *Caratube International Oil Company LLP and Devinci Salah Hourani v. Republic of Kazakhstan* (ICSID Case No. ARB/13/13), Decision on the Proposal for Disqualification of Bruno Boesch, 20 March 2014.

¹²⁹ *Ibid.*, para. 91.

¹³⁰ *Ruby Roz Agricol and Kaseem Omar v. Republic of Kazakhstan* (UNCITRAL), Award on Jurisdiction, 1 August 2013.

¹³¹ *Caratube International Oil Company LLP and Devinci Salah Hourani v. Republic of Kazakhstan* (ICSID Case No. ARB/13/13), Decision on the Proposal for Disqualification of Bruno Boesch, 20 March 2014, para 74.

¹³² *Ibid.*, para 87.

¹³³ *Ibid.*, para. 90. However, the two unchallenged arbitrators noted that “the mere fact of Mr. Boesch’s prior appointments as arbitrator by Curtis, Mallet-Prevost, Colt & Mosle LLP, [the same law firm representing the Kazakhstan in the present arbitration] one of which was made on behalf of the Respondent in the Ruby Roz arbitration, does not, without more, indicate a manifest lack of independence or impartiality on the part of Mr. Boesch. Absent any other objective circumstances demonstrating that these prior appointments manifestly influence his ability to exercise independent judgment in the present arbitration, they do not on their own justify Mr. Boesch’s disqualification.” *Ibid.*, para. 107.

courts before pursuing international arbitration and refused to interpret the BIT's MFN clause as allowing to obviate this requirement.¹³⁴ Given that these same issues came up in *İçkale İnşaat*, the claimant argued that Prof. Sands lacked impartiality due to his exposure to factual evidence and witness testimony from *Kiliç*. The claimant also noted that Prof. Sands had “a position to defend [and would] approach the Article VII.2 issues with ‘a desire to conform’ his decision” to his previous views.¹³⁵ When dismissing the challenge, the tribunal distinguished the case before it from *Caratube*, noting that the overlapping facts in that case were relevant to the merits of the arbitration, while the overlap in the *İçkale* case “merely concern[ed] facts relevant to the interpretation of Article VII(2) of the BIT and related legal issues such as the scope of application of the MFN clause”.¹³⁶ As such, in the tribunal's view, its task was “fundamentally a legal one” and the overlap did not indicate a manifest lack of impartiality.¹³⁷

E. Annulment and judicial review

Annulment under the ICSID Convention

All five decisions rendered in 2014 on applications for annulment under the ICSID Convention rejected unanimously the applications.¹³⁸ The *El Paso v. Argentina* Committee, for example, addressed three distinct grounds for annulment under Article 52 of the ICSID Convention: (1) manifest excess of powers; (2) failure to state reasons and; (3) serious departure from a fundamental rule of procedure. With regard to the first ground, the *El Paso* Committee noted that “[p]ursuant to the plain meaning of the word ‘manifest’ in the context of Article 52 of the ICSID Convention and considering the finality and binding nature of awards, features set forth in Article 53 of said Convention, for this Committee, the excess of powers should be obvious, evident, clear, self-evident and extremely serious.”¹³⁹ With regard to the second ground, the *El Paso* Committee noted that “there is no ground for annulment of the award if it is based on an alleged inaccuracy of the arbitral tribunal's reasoning or because the reasons underlying its decisions were not convincing to the Party requesting the annulment of the Award [...], unconvincing reasons do not amount to a lack of reasons.”¹⁴⁰ With regard to the third ground, the *El Paso* Committee noted that, in light of its breadth, the party alleging the existence of a serious departure from a fundamental rule of procedure, must indicate what is the fundamental rule affected and define clearly where the serious departure lies.¹⁴¹ In the view of the *El Paso* Committee, Argentina had failed to identify a fundamental rule of procedure from which the tribunal had departed.

¹³⁴ *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan* (ICSID Case No. ARB/10/1), Award, 2 July 2013.

¹³⁵ *İçkale İnşaat Limited Şirketi v. Turkmenistan* (ICSID Case No. ARB/10/24), Decision on Claimant's Proposal to Disqualify Professor Philippe Sands, 11 July 2014, para. 74.

¹³⁶ *Ibid.*, para. 119.

¹³⁷ *Ibid.*, para. 120.

¹³⁸ *Impregilo S.p.A. v. Argentine Republic* (ICSID Case No. ARB/07/17), Decision of the ad hoc Committee on the Application for Annulment, 24 January 2014; *Caratube International Oil Company LLP v. The Republic of Kazakhstan* (ICSID Case No. ARB/08/12), Decision on the Annulment Application of Caratube International Oil Company LLP, 21 February 2014; *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay* (ICSID Case No. ARB/07/29), Decision on Annulment, 19 May 2014; *Alapli Elektrik B.V. v. Republic of Turkey* (ICSID Case No. ARB/08/13), Decision on Annulment, 10 July 2014; *El Paso Energy International Company v. The Argentine Republic* (ICSID Case No. ARB/03/15), Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, 22 September 2014.

¹³⁹ *El Paso Energy International Company v. The Argentine Republic* (ICSID Case No. ARB/03/15), Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, 22 September 2014, para. 142.

¹⁴⁰ *Ibid.*, para. 217.

¹⁴¹ *Ibid.*, para. 268.

The *Impregilo* Committee rejected the respondent's argument that the tribunal had committed a "manifest excess of powers" when it decided (by majority) that the MFN clause in the applicable Argentina-Italy BIT allowed the claimant to have recourse to the Argentina-United States BIT, which does not require recourse to local courts before resorting to the ICSID jurisdiction. The *Impregilo* Committee reasoned that it is not its task "to review in detail and de novo the complex issue involved in the jurisdictional debate in this case, to support the analysis of the dissenting arbitrator and to consider that such analysis is the one to prevail and to conclude that the majority manifestly exceeded its powers."¹⁴² In the Committee's view, "[t]he interpretation made by an Arbitration Tribunal in one way or another on the possible extension of the MFN clause to jurisdictional issues can never by itself constitute a clear, obvious, and self-evident excess of powers."¹⁴³

Judicial Review

The United States Supreme Court overturned a 2012 ruling by the US Court of Appeals for the District of Columbia that had set aside the 2007 UNCITRAL award rendered in favour of BG Group Plc. against Argentina. In its 2012 judgment, the Court of Appeals found that the arbitral tribunal had wrongly asserted jurisdiction over the dispute notwithstanding the claimant's failure to comply with the 18-month local litigation requirement contained in Article 8(1) of the Argentina-UK BIT. The US Supreme Court majority opinion disagreed with this conclusion and held that (a) the treaty's local litigation requirement "operates as a procedural condition precedent to arbitration" rather than a "condition of consent" to arbitration and (b) it is for arbitrators primarily to interpret and apply such requirements and reviewing courts cannot review their decisions de novo; rather, they must do so with considerable deference.¹⁴⁴ This effectively means that the original arbitral award in BG Group v. Argentina stands.

In two cases – *OKKV v. Kyrgyz Republic* and *Lee John Beck v. Kyrgyz Republic* – the respondent State submitted to the courts of the Russian Federation (seat of the arbitration) a request to set aside the awards. Initially, the Moscow Arbitrazh Court rejected both applications.¹⁴⁵ However, thereafter the Economic Court of the Commonwealth of Independent States (CIS) – also on the application from the Kyrgyz Republic – rendered its decision according to which Article 11 of the Moscow Convention on Protection of Investor Rights (used as the legal basis for investor claims in both cases) could not be interpreted as setting out a contracting State's consent to arbitration.¹⁴⁶ Following this development, the Moscow Arbitrazh Court rendered another judgment in *OKKV v. Kyrgyz Republic*, where the court – relying on the CIS Economic Court's opinion – ruled that the arbitral award should be set aside.¹⁴⁷

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¹⁴² *Impregilo S.p.A. v. Argentine Republic* (ICSID Case No. ARB/07/17), Decision of the ad hoc Committee on the Application for Annulment, 24 January 2014, para. 140.

¹⁴³ *Ibid.*, para. 141.

¹⁴⁴ *BG Group Plc. v. The Republic of Argentina* (UNCITRAL), Judgment of the Supreme Court of the United States, 5 March 2014, page 11-14. In his dissent, Chief Justice John Roberts rejected the majority's analysis and stated that the 18-month local litigation requirement is a condition of consent to arbitration and, therefore, may not be circumvented. *Ibid.*, page 6 (C.J. Roberts Dissenting).

¹⁴⁵ *OKKV (OKKB) and others v. Kyrgyz Republic*, Judgment of the Moscow Arbitrazh Court on Application to Set Aside Award, 23 June 2014; *Lee John Beck and Central Asian Development Corporation v. Kyrgyz Republic*, Judgment of the Moscow Arbitrazh Court on Application to Set Aside Award, 24 June 2014.

¹⁴⁶ On the Interpretation of Article 11 of the Convention on Protection of Investor Rights of 28 March 1997, Decision (Advisory Opinion No. 01-1/1-14), The Economic Court of the Commonwealth of Independent States, 23 September 2014.

¹⁴⁷ *OKKV (OKKB) and others v. Kyrgyz Republic*, Second Judgment of the Moscow Arbitrazh Court on Application to Set Aside Award, 19 November 2014. The Kyrgyz Republic's applications with respect to *Lee John Beck v. Kyrgyz Republic*, as well as one other case based on the Moscow Convention on Protection of Investor Rights (*Stans Energy v. Kyrgyz Republic*), reportedly remain pending before the Moscow Arbitrazh Court.

In 2014 and early 2015 two important multilateral developments geared towards addressing existing transparency deficit in ISDS took place:

- *The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*¹⁴⁸ came into effect on 1 April 2014. The UNCITRAL Transparency Rules provide for open oral hearings in ISDS cases as well as the publication of key documents, including notices of arbitration, pleadings, transcripts, and all decisions and awards issued by the tribunal (subject to certain safeguards, including protection of confidential information).¹⁴⁹ By default (in the absence of further action), the Rules apply only to UNCITRAL arbitrations brought under IIAs concluded after 1 April 2014, and thus exclude the multitude of pre-existing IIAs from their coverage.
- *The Convention on Transparency in Treaty-based Investor-State Arbitration* was adopted by the UN General Assembly on 10 December 2014 and opened for signature on 17 March 2015.¹⁵⁰ The aim of the Convention is to give those States¹⁵¹ that wish to make the UNCITRAL Transparency Rules applicable to their existing IIAs a mechanism to do so. Specifically, and in the absence of reservations by the signatories, the Transparency Rules will apply to disputes where (i) both the respondent State and the home State of the claimant investor are parties to the Convention; and (ii) only the respondent State is party to the Convention but the claimant investor agrees to the application of the Rules. While a minimum of three parties need to sign and ratify the Convention for it to enter into force, it has already been signed by Canada, Finland, France, Germany, Mauritius, Sweden, Switzerland, Syrian Arab Republic, United Kingdom, and the United States.

Concluding remarks

The IIA regime is going through a period of reflection, review and revision. Investment dispute settlement is at the heart of this debate, with a number of countries reassessing their positions. There is a strong case for a systematic reform of ISDS.

UNCTAD's forthcoming *World Investment Report 2015* will offer an action menu for investment regime reform.

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¹⁴⁸ Available at http://www.uncitral.org/uncitral/uncitral_texts/arbitration/2014Transparency.html.

¹⁴⁹ A repository for information published under the Transparency Rules has been established, available at <http://www.uncitral.org/transparency-registry/en/introduction.html>.

¹⁵⁰ Available at <http://www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf>.

¹⁵¹ As well as regional economic integration organisations.

Annex 1. Known treaty-based cases initiated in 2014

No.	Case Title	Home Country	Applicable Treaty
1	A11Y Ltd v. Czech Republic (UNCITRAL)	United Kingdom	Czech Republic-United Kingdom BIT
2	Albaniabeg Ambient Sh.p.k, M. Angelo Novelli and Costruzioni S.r.l. v. Republic of Albania (ICSID Case No. ARB/14/26)	Italy	Energy Charter Treaty
3	Alpiq AG v. Romania (ICSID Case No. ARB/14/28)	Switzerland	Romania-Switzerland BIT; Energy Charter Treaty
4	Anglia Auto Accessories, Ivan Peter Busta and Jan Peter Busta v. Czech Republic (SCC)	United Kingdom	Czech Republic- United Kingdom BIT
5	Anglo American PLC v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/14/1)	United Kingdom	United Kingdom-Venezuela BIT
6	Ansung Housing Co., Ltd. v. People's Republic of China (ICSID Case No. ARB/14/25)	Korea, Republic of	China-Republic of Korea BIT
7	Ayoub-Farid Saab and Fadi Saab v. Cyprus (ICC)	Lebanon	Cyprus-Lebanon BIT
8	Bear Creek Mining Corporation v. Republic of Peru (ICSID Case No. ARB/14/21)	Canada	Canada-Peru FTA
9	Beijing Urban Construction Group Co. Ltd. V. Republic of Yemen (ICSID Case No. ARB/14/30)	China	China-Yemen BIT
10	Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic (ICSID Case No. ARB/14/3)	Belgium; France; Germany	Energy Charter Treaty
11	Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic (ICSID Case No. ARB/14/32)	Austria	Argentina-Austria BIT
12	CEAC Holdings Limited v. Montenegro (ICSID Case No. ARB/14/8)	Cyprus	Cyprus-Serbia and Montenegro BIT
13	Cem Uzan v. Republic of Turkey (SCC)	Unknown	Energy Charter Treaty
14	City-State N.V., Praktyka Asset Management Company LLC, Crystal-Invest LLC and Prodiz LLC v. Ukraine (ICSID Case No. ARB/14/9)	Netherlands	Netherlands-Ukraine BIT
15	Corona Materials, LLC v. Dominican Republic (ICSID Case No. ARB(AF)/14/3)	United States	CAFTA
16	Cyprus Popular Bank Public Co. Ltd. v. Hellenic Republic (ICSID Case No. ARB/14/16)	Cyprus	Cyprus-Greece BIT
17	David Aven, Samuel Aven, Carolyn Park, Eric Park, Jeffrey Shioleno, Giacomo Buscemi, David Janney and Roger Raguso v. Costa Rica (UNCITRAL)	United States of America	CAFTA
18	Elektrogospodarstvo Slovenije - razvoj ininzeniring d.o.o. v. Bosnia and Herzegovina (ICSID Case No. ARB/14/13)	Slovenia	Energy Charter Treaty; Bosnia Herzegovina-Slovenia BIT
19	EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic (ICSID Case No. ARB/14/14)	Canada; United States of America	Slovakia-United States BIT; Canada-Slovakia BIT

20	Highbury International AVV, Compañía Minera de Bajo Caroní AVV, and Ramstein Trading Inc. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/14/10)	Netherlands	Netherlands-Venezuela BIT
21	IBT Group LLC, Constructor, Consulting and Engineering (Panamá) SA and International Trade and Business and Trade, LLC v. Republic of Panama (ICSID Case No. ARB/14/33)	United States of America	Panama-United States BIT
22	Infinito Gold Ltd. v. Republic of Costa Rica (ICSID Case No. ARB/14/5)	Canada	Canada-Costa Rica BIT
23	InfraRed Environmental Infrastructure GP Limited and others v. Kingdom of Spain (ICSID Case No. ARB/14/12)	United Kingdom	Energy Charter Treaty
24	Ioan Micula, Viorel Micula and others v. Romania (ICSID Case No. ARB/14/29)	Sweden	Romania-Sweden BIT
25	JML Heirs LLC and J.M. Longyear LLC v. Canada (UNCITRAL)	United States of America	NAFTA
26	Krederi Ltd. v. Ukraine (ICSID Case No. ARB/14/17)	United Kingdom	Ukraine-United Kingdom BIT
27	Louis Dreyfus Armateurs v. India (UNCITRAL)	France	France-India BIT
28	Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain (ICSID Case No. ARB/14/1)	Netherlands	Energy Charter Treaty
29	Michael Dagher v. Republic of the Sudan (ICSID Case No. ARB/14/2)	Jordan; Lebanon	Jordan-Sudan BIT; Lebanon-Sudan BIT
30	NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain (ICSID Case No. ARB/14/11)	Netherlands	Energy Charter Treaty
31	Nusa Tenggara Partnership B.V. and PT Newmont Nusa Tenggara v. Republic of Indonesia (ICSID Case No. ARB/14/15)	Netherlands	Indonesia-Netherlands BIT
32	Oded Besserglik v. Republic of Mozambique (ICSID Case No. ARB(AF)14/2)	South Africa	Mozambique-South Africa BIT
33	Red Eléctrica Internacional SAU v. Bolivia (UNCITRAL)	Spain	Spain-Bolivia BIT
34	RENERGY S.à r.l. v. Kingdom of Spain (ICSID Case No. ARB/14/18)	Unknown	Energy Charter Treaty
35	RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain (ICSID Case No. ARB/14/34)	Germany	Energy Charter Treaty
36	Sodexo Pass International SAS v. Hungary (ICSID Case No. ARB/14/20)	France	France-Hungary BIT
37	Tarique Bashir and SA Interpétrol Burundi v. Republic of Burundi (ICSID Case No. ARB/14/31)	Belgium	Belgium/Luxembourg-Burundi BIT
38	Unión Fenosa Gas, S.A. v. Arab Republic of Egypt (ICSID Case No. ARB/14/4)	Spain	Egypt-Spain BIT
39	United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia (ICSID Case No. ARB/14/24)	Netherlands	Estonia-Netherlands BIT
40	VICAT v. Republic of Senegal (ICSID Case No. ARB/14/19)	France	France-Senegal BIT
41	Vodafone International Holdings BV v. India (UNCITRAL)	Netherlands	India-Netherlands BIT
42	Zelena N.V. and Energo-Zelena d.o.o In ija v. Republic of Serbia (ICSID Case No. ARB/14/27)	Belgium	Belgium/Luxembourg-Serbia BIT

Annex 2. Known investment treaty claims, by respondents

No.	Respondent State	Cases
1	Argentina	56
2	Venezuela, Bolivarian Republic of	36
3	Czech Republic	29
4	Egypt	24
5	Canada	23
6	Ecuador	21
7	Mexico	21
8	India	16
9	Ukraine	16
10	Poland	15
11	United States of America	15
12	Kazakhstan	14
13	Spain	14
14	Hungary	13
15	Slovakia	12
16	Bolivia, Plurinational State of	11
17	Kyrgyz Republic	11
18	Romania	11
19	Peru	10
20	Turkey	10
21	Costa Rica	9
22	Pakistan	9
23	Russian Federation	9
24	Georgia	8
25	Moldova, Republic of	8
26	Turkmenistan	8
27	Uzbekistan	7
28	Albania	6
29	Algeria	6
30	Indonesia	6
31	Jordan	6
32	Bulgaria	5
33	Croatia	5
34	Lithuania	5
35	Serbia	5
36	Burundi	4
37	Congo, Democratic Republic of	4
38	Estonia	4
39	Mongolia	4
40	Philippines	4
41	Viet Nam	4
42	Belize	3
43	Chile	3
44	Dominican Republic	3
45	El Salvador	3
46	Germany	3
47	Guatemala	3
48	Latvia	3
49	Lebanon	3

50	Macedonia, The former Yugoslav Republic of	3
51	Malaysia	3
52	Montenegro	3
53	Panama	3
54	Paraguay	3
55	Slovenia	3
56	Sri Lanka	3
57	Yemen	3
58	Zimbabwe	3
59	Armenia	2
60	Azerbaijan	2
61	Bosnia and Herzegovina	2
62	China	2
63	Cyprus	2
64	France	2
65	Ghana	2
66	Greece	2
67	Lao People's Democratic Republic	2
68	Morocco	2
69	Senegal	2
70	Tanzania, United Republic of	2
71	United Arab Emirates	2
72	United Kingdom	2
73	Australia	1
74	Bangladesh	1
75	Belgium	1
76	Ethiopia	1
77	Gabon	1
78	Gambia	1
79	Grenada	1
80	Guyana	1
81	Iran, Islamic Republic of	1
82	Italy	1
83	Libya	1
84	Madagascar	1
85	Mozambique	1
86	Myanmar	1
87	Nicaragua	1
88	Nigeria	1
89	Oman	1
90	Equatorial Guinea, Republic of	1
91	Korea, Republic of	1
92	Saudi Arabia	1
93	South Africa	1
94	Sudan	1
95	Tajikistan	1
96	Thailand	1
97	Trinidad and Tobago	1
98	Tunisia	1
99	Uruguay	1

Annex 3. Arbitral decisions adopted in 2014

A. Decisions upholding jurisdiction (at least in part) (without examining the merits)

Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica (ICSID Case No. ARB/13/2), Decision on Jurisdiction, 15 December 2014 (A. Mourre (chair), R. Ramírez and A. Jana).

Churchill Mining PLC v. Republic of Indonesia (ICSID Case No. ARB/12/14 and 12/40), Decision on Jurisdiction, 24 February 2014 (G. Kaufmann-Kohler (chair), M. Hwang and A. Van den Berg).

Giovanni Alemanni and Others v. The Argentine Republic (ICSID Case No. ARB/07/8), Decision on Jurisdiction and Admissibility, 17 November 2014 (F. Berman (chair), K. Böckstiegel and C. Thomas).

Lao Holdings N.V. v. Lao People's Democratic Republic (ICSID Case No. ARB(AF)/12/6), Decision on Jurisdiction, 21 February, 2014 (I. Binnie (chair), B. Hanotiau and B. Stern).

Planet Mining Pty Ltd v. Republic of Indonesia (ICSID Case No. ARB/12/14 and 12/40), Decision on Jurisdiction, 24 February 2014 (G. Kaufmann-Kohler (chair), M. Hwang and A. Van den Berg).

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B. Decisions rejecting jurisdiction (in toto)

Achmea B.V. v. The Slovak Republic (UNCITRAL, PCA Case No. 2013-12 (Number 2)), Award on Jurisdiction and Admissibility, 20 May 2014 (L. Lévy (chair), P. Dupuy and J. Beechey).

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Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines (ICSID Case No. ARB/11/12), Award, 10 December 2014 (P. Bernardini (chair), S. Alexandrov and A. Van den Berg).

National Gas S.A.E. v. Arab Republic of Egypt (ICSID Case No. ARB/11/7), Award, 3 April 2014 (V. Veeder (chair), L. Fortier and B. Stern).

Nova Scotia Power Incorporated v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/11/1), Excerpts of the Award of 30 April 2014 (H. Van Houtte (chair), D. Williams and R. Vinuesa).

C. Decisions finding State's liability for IIA breaches (at least in part)

Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/10/19), Award, 18 November 2014 (J. Fernández-Armesto (chair), R. Vinuesa and H. Alvarez).

Gold Reserve Inc. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/09/1), Award, 22 September 2014 (P. Bernardini (chair), D. Williams and P. Dupuy).

Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia (UNCITRAL, PCA Case No. 2011-17), Award (corrected), 31 January 2014 (J. Júdece (chair), M. Conthe and R. Vinuesa).

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Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/07/27), Award, 9 October 2014 (G. Guillaume (chair), G. Kaufmann-Kohler and A. El-Kosheri).

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Veteran Petroleum Limited (Cyprus) v. The Russian Federation (UNCITRAL, PCA Case No. AA 228), Final Award, 18 July 2014 (L. Fortier (chair), C. Poncet and S. Schwebel).

Yukos Universal Limited (Isle of Man) v. The Russian Federation (UNCITRAL, PCA Case No. AA 227), Final Award, 18 July 2014 (L. Fortier (chair), C. Poncet and S. Schwebel).

D. Decisions dismissing the investors' claims (in toto)

Apotex Holdings Inc. and Apotex Inc. v. United States of America (ICSID Case No. ARB(AF)/12/1), Award, 25 August 2014 (V. Veeder (chair), J. Rowley and J. Crook).

David Minnotte & Robert Lewis v. Republic of Poland (ICSID Case No. ARB(AF)/10/1), Award, 16 May 2014 (V. Lowe (chair), M. Mendelson and E. Silva Romero).

Renée Rose Levy de Levi v. Republic of Peru (ICSID Case No. ARB/10/17), Award, 26 February 2014 (R. Blanco (chair), B. Hanotiau and J. Godoy).

Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey (ICSID Case No. ARB/11/28), Award, 10 March 2014 (G. Griffith (chair), M. Jaffe and R. Knieper).

Vigotop Limited v. Hungary (ICSID Case No. ARB/11/22), Award, 1 October 2014 (K. Sachs (chair), D. Bishop and V. Heiskanen).

E. Decisions awarding compensation

Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/10/19), Award, 18 November 2014 (J. Fernández-Armesto (chair), R. Vinuesa and H. Alvarez).

Gold Reserve Inc. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/09/1), Award, 22 September 2014 (P. Bernardini (chair), D. Williams and P. Dupuy).

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F. Decisions on the application for annulment

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G. Decisions not publicly available

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H. Preliminary decisions (e.g. Art 41(5) ICSID)

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J. Domestic court decisions

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K. Supranational court decisions

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